

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0241
)	2 CA-CR 2011-0257
Appellee,)	(Consolidated)
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
FRANK EMILIANO RENTERIA,)	Not for Publication
)	Rule 111, Rules of
Appellant.)	the Supreme Court
_____)	

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause Nos. CR201000337 and CR201100233 (Consolidated)

Honorable Robert Duber II, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz, and
Kathryn A. Damstra

Tucson
Attorneys for Appellee

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Tucson
Attorney for Appellant

ESPINOSA, Judge.

¶1 Frank Renteria was convicted after a jury trial of possession of methamphetamine for sale, possession of drug paraphernalia, misconduct involving weapons, and driving with an illegal drug or its metabolite in his body. The trial court sentenced him to a combination of mitigated and presumptive, concurrent prison terms,¹ the longest of which was 7.5 years. Renteria argues on appeal that the court erred in denying his motion for mistrial based on prosecutorial misconduct. We affirm.

¶2 We view the facts in the light most favorable to upholding the jury's verdicts. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). After a traffic stop, Renteria was arrested on suspicion of driving under the influence of an intoxicant. During a search incident to that arrest, police officers found three small bags of methamphetamine on Renteria's person. The total weight of the methamphetamine was approximately eight grams, an amount consistent with possession for sale. After searching Renteria's car, officers also found a loaded handgun, a scale, and several small plastic bags. A sample of Renteria's blood tested positive for methamphetamine.

¶3 During cross-examination of a police officer on the second day of trial, defense counsel asked several questions concerning whether the officer had conducted any additional investigation of any of the contacts listed in Renteria's cellular telephone or of "where the drugs came from." Counsel inquired whether the officer knew where Renteria had been going with the methamphetamine. The officer responded that he did

¹Renteria was sentenced to ten days in jail for driving with an illegal drug or its metabolite in his system, with credit for thirty-six days of presentence incarceration.

not, stating Renteria was not going to tell him and he had not asked him questions because he “did not want to talk.” Defense counsel then asked whether Renteria had requested an attorney, and the officer responded that he had. During redirect examination, the prosecutor asked the officer why he had not conducted “a larger investigation” or “sting operation.” The officer responded that his decision depended on several factors, primarily whether a suspect was cooperating, which Renteria was not. After the prosecutor asked “where the defendant was cooperating, what difference would it make?” defense counsel objected, stating the answer would reveal that Renteria had asked for an attorney.

¶4 At a bench conference, Renteria requested a mistrial, arguing the prosecutor’s questions had improperly suggested that Renteria had impeded further investigation because he did not cooperate and instead had invoked his right to counsel. The trial court stated that it believed the prosecutor’s line of inquiry was improper, but denied the motion. However, the court gave the jury a limiting instruction stating “[n]o defendant is required to cooperate in the prosecution of that person” and,

if . . . the question comes up, or you begin to wonder about whether he did or didn’t cooperate . . . , that is an area that you should not be discussing. It should not come into your consideration at all because a person or citizen has the right to require the government to prove its case and is not required to do anything to cooperate in their prosecution.

¶5 “Because the trial court is in the best position to determine the effect of a prosecutor’s comments on a jury,” we review a court’s refusal to grant a mistrial based on alleged prosecutorial misconduct for an abuse of discretion. *State v. Newell*, 212 Ariz.

389, ¶ 61, 132 P.3d 833, 846 (2006). “Prosecutorial misconduct ‘is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial.’” *State v. Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d 423, 426-27 (App. 2007), *quoting Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). To prevail on a claim of prosecutorial misconduct, Renteria was required to “show that the offending statements, in the context of the entire proceeding, ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’” *Newell*, 212 Ariz. 389, ¶ 60, 132 P.3d at 846, *quoting State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998). A defendant is denied due process if there is a “‘reasonable likelihood . . . that the misconduct could have affected the jury’s verdict.’” *State v. Martinez*, 218 Ariz. 421, ¶ 15, 189 P.3d 348, 353 (2008), *quoting State v. Velazquez*, 216 Ariz. 300, ¶ 45, 166 P.3d 91, 102 (2007).

¶6 Given defense counsel’s cross-examination of the officer, the prosecutor’s questions broached no new territory. The jury already was aware Renteria had not cooperated with police and had invoked his right to counsel. And defense counsel’s questions also challenged the sufficiency or thoroughness of the police investigation, suggesting officers could have done more to determine whether Renteria intended to sell the methamphetamine in his possession. The prosecutor did nothing more than respond to that line of inquiry by eliciting evidence that one of the reasons the investigation did not proceed further was Renteria’s decision not to cooperate with law enforcement. “The

rule of invited error applies when a party elicits evidence or comments that ‘make otherwise irrelevant evidence highly relevant or require some response or rebuttal.’” *State v. Doerr*, 193 Ariz. 56, ¶ 27, 969 P.2d 1168, 1175 (1998), *quoting Pool*, 139 Ariz. at 103, 677 P.2d at 266; *see also State v. Garcia*, 133 Ariz. 522, 526, 652 P.2d 1045, 1049 (1982) (“Where the whole field of examination is opened by defense counsel, he opens the door to further inquiry and may not assign its fruits as error on appeal.”); *State v. Lucero*, 223 Ariz. 129, ¶ 17, 220 P.3d 249, 255 (App. 2009) (invited-error doctrine “precludes a party who causes or initiates an error from profiting from the error on appeal”).

¶7 To the extent, however, that the prosecutor’s inquiry would permit the jury to infer that Renteria had some obligation to cooperate with police, or that his failure to do so constituted evidence of his guilt, the inquiry was improper. *Cf. State v. Moore*, 112 Ariz. 271, 274, 540 P.2d 1252, 1255 (1975) (prosecutor’s reference to *Miranda*² warnings proper absent “evidence that the defendant elected to remain silent or refused to cooperate with the police”). But the trial court’s limiting instruction eclipsed this possibility, and we presume the jury followed the court’s instruction and did not consider Renteria’s failure to cooperate in determining his guilt. *See Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d at 847. In light of these circumstances, we cannot say any improper conduct by the prosecutor “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Id.* ¶ 60, *quoting Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191.

²*Miranda v. Arizona*, 384 U.S. 436 (1966).

Thus, the court did not abuse its discretion in denying Renteria's mistrial motion. *See id.*

¶ 61.

¶ 8 For the reasons stated, Renteria's convictions and sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge